

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3

LORI GJENASHAJ, :
Plaintiff, : 19cv4142
-against- : MEMORANDUM & ORDER
THE CITY OF NEW YORK, *et al.*, :
Defendants. :
:

4 WILLIAM H. PAULEY III, Senior United States District Judge:

5 Plaintiff Lori Gjenashaj brings this federal civil rights action for excessive force
6 and failure to supervise against the City of New York and two members of the New York City
7 Police Department (“NYPD”). Defendant Lieutenant Matthew Harrison moves for summary
8 judgment dismissing the claims against him. For the reasons that follow, Lieutenant Harrison’s
9 motion for summary judgment is granted in part and denied in part.

10 BACKGROUND

11 The following facts are undisputed unless otherwise noted. This action arises out
12 of a chaotic sequence of events that began when Gjenashaj fired two blank rounds from a starter
13 pistol at her daughter and mother-in-law inside the family’s Staten Island home. (Pl.’s Resp. to
14 Def. Lt. Harrison’s Rule 56.1 Statement of Undisputed Facts, ECF No. 99 (“Pl.’s 56.1”), ¶ 4.)
15 As Gjenashaj ran out the front door, her husband wrestled the pistol from her and followed her
16 outside. (Decl. of Brachah Goykadosh in Supp. of Def. Lieutenant Matthew Harrison’s Mot. for
17 Summ. J., ECF No. 94 (“Goykadosh Decl.”), Ex. L (“Pl.’s Dep.”), at 90:3–22.) Gjenashaj
18 jumped into the family SUV, and her husband got in the front passenger side and placed the

1 pistol under his seat. (Pl.'s Dep., at 90:3–91:21; Goykadosh Decl., Ex. J (“Q. Gjenashaj Dep.”),
 2 at 79:20–82:11.) Hearing gunshots, a neighbor called 911. (Decl. of Edward Stone in Opp'n to
 3 Def. Lieutenant Matthew Harrison's Mot. for Summ. J., ECF No. 98 (“Stone Decl.”), Ex. F, at
 4 4.)

5 Responding to a radio alert, NYPD police officers attempted to stop the SUV and
 6 apprehend Gjenashaj. (Pl.'s 56.1 ¶ 5.) She pulled the SUV over and her husband exited the
 7 vehicle. (Q. Gjenashaj Dep., at 92:3–12, 117:21–23.) However, Gjenashaj refused to exit the
 8 SUV and once again fled. (Pl.'s 56.1 ¶ 5.)

9 Next, Gjenashaj drove to a friend's home and knocked on the front door. (Pl.'s
 10 56.1 ¶¶ 3, 8.) When no one answered, she threw a brick at the door several times. (Pl.'s 56.1
 11 ¶ 8.) Thereafter, her friend's thirteen-year-old son opened the door and told Gjenashaj that his
 12 mother was not home. (Pl.'s 56.1 ¶¶ 8–12.) While wielding the pistol, Gjenashaj borrowed the
 13 boy's cell phone and called her friend. (Pl.'s 56.1 ¶¶ 11–13.) Threatened by Gjenashaj's words
 14 and tone, the friend called 911 and reported a disturbance at her home. (Pl.'s 56.1 ¶¶ 13–15.)
 15 Two NYPD officers responded to the incident, spoke to Gjenashaj's friend, and viewed a cell
 16 phone video of Gjenashaj holding the pistol. (Pl.'s 56.1 ¶¶ 16–17; Goykadosh Decl., Ex. C
 17 (“Campanella-Rivera Grand Jury Test”), at 3:8–24.) In a radio transmission, Lieutenant
 18 Harrison and Police Officer Giancarlo Maratea were advised that Gjenashaj fled the scene and
 19 had a gun. (Pl.'s 56.1 ¶¶ 18–19.)

20 The police located and surrounded Gjenashaj's SUV. (Pl.'s 56.1 ¶¶ 21–25.)
 21 Lieutenant Harrison and Officer Maratea arrived on scene and approached the SUV with their
 22 firearms drawn—Harrison on the passenger's side and Maratea on the driver's side. (Pl.'s 56.1
 23 ¶¶ 21–28.)

1 At this point, the parties' versions of events diverge sharply. According to
 2 Lieutenant Harrison, Gjenashaj turned up the volume on the radio in her SUV, picked up the
 3 gun, and pointed it at the passenger side window where he was standing. (Def.'s Statement of
 4 Undisputed Facts Pursuant to Local Rule 56.1, ECF No. 95 ("Def.'s 56.1"), ¶ 32.) In fear for his
 5 life, Lieutenant Harrison shouted "Gun!" and retreated from Gjenashaj's SUV to take cover.
 6 (Def.'s 56.1 ¶¶ 34–41.) Both officers repeatedly ordered Gjenashaj to throw the gun out of her
 7 vehicle, show them her hands, and exit the SUV. (Def.'s 56.1 ¶¶ 42–43.) According to
 8 Lieutenant Harrison, when Gjenashaj emerged from the SUV, she turned towards the officers
 9 and assumed a two-handed shooting stance with the pistol. (Def.'s 56.1 ¶ 50.) Officer Maratea
 10 testified that Gjenashaj raised her pistol and pointed it at him and Lieutenant Harrison. (Def.'s
 11 56.1 ¶¶ 44, 47–49.) When Gjenashaj aimed at the police, Officer Maratea discharged four
 12 rounds. (Def.'s 56.1 ¶¶ 55–56.) Hearing a "pop" sound, Lieutenant Harrison fired a single shot.
 13 (Def.'s 56.1 ¶¶ 57–59.)

14 Gjenashaj presents a different narrative. She asserts she never pointed her pistol
 15 at Lieutenant Harrison when he was on the passenger side of the vehicle; never heard either
 16 officer shout "Gun!" or anything else; and held her hands up signaling surrender when she exited
 17 the vehicle. (Pl.'s Dep., 113:9–14, 113:18–19, 119:9–21; Pl.'s 56.1 ¶ 52.) Importantly,
 18 Gjenashaj claims that she exited the SUV without the pistol. (Pl.'s Dep., 118:22–23.)

19 It is undisputed that Gjenashaj was shot twice and that she then reentered her
 20 vehicle. Thereafter, Harrison and Maratea ordered her multiple times to toss the pistol out of the
 21 SUV. (Pl.'s 56.1 ¶¶ 60–61, 63.) Ultimately, she complied. (Pl.'s 56.1 ¶ 65.) When the officers
 22 approached to handcuff her, Gjenashaj resisted arrest by kicking Lieutenant Harrison. (Pl.'s 56.1

1 ¶¶ 69–70.) Gjenashaj was then removed from her vehicle, brought to the ground, and
2 handcuffed. (Pl.’s 56.1 ¶ 72.)

3 A grand jury indicted Gjenashaj for multiple state crimes and she ultimately pled
4 guilty to menacing, possession of a weapon, and fleeing the police. (Pl.’s 56.1 ¶¶ 74–75.)

5 DISCUSSION

6 I. Legal Standard

7 Summary judgment is proper only when “there is no genuine dispute as to any
8 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).
9 The movant bears the burden to demonstrate “the absence of a genuine issue of material fact.”
10 Celotex v. Catrett, 477 U.S. 317, 323 (1986). There is no genuine issue for trial where “the
11 record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.”
12 Scott v. Harris, 550 U.S. 372, 380 (2007) (quotation marks omitted). This Court must “construe
13 all evidence in the light most favorable to the nonmoving party, drawing all inferences and
14 resolving all ambiguities in its favor.” Dickerson v. Napolitano, 604 F.3d 732, 740 (2d Cir.
15 2010). After the movant makes an initial showing that there is no material issue of fact, the
16 burden shifts to the non-movant to “set forth specific facts showing that there is a genuine issue
17 for trial” without relying merely on allegations or denials in the pleadings. Anderson v. Liberty
18 Lobby, Inc., 477 U.S. 242, 249 (1986); accord Wright v. Goord, 554 F.3d 255, 266 (2d Cir.
19 2009).

20 II. Personal Involvement of Defendants in Use of Excessive Force

21 Lieutenant Harrison contends that summary judgment is warranted because he
22 was not personally involved in the alleged use of excessive force against Gjenashaj. “[P]ersonal
23 involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of

1 damages under § 1983.” Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994); accord Moffit v.
 2 Town of Brookfield, 950 F.2d 880, 885 (2d Cir. 1991). “A police officer is personally involved
 3 in the use of excessive force if the officer either: (1) directly participates in an assault; or (2) is
 4 present during the assault, and fails to intercede on behalf of the victim even though he had a
 5 reasonable opportunity to do so.” Vesterhalt v. City of New York, 667 F. Supp. 2d 292, 297
 6 (S.D.N.Y. 2009) (citing Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123, 129 (2d Cir. 1997)).

7 Here, Lieutenant Harrison was present at the scene, discharged his firearm, and
 8 effectuated Gjenashaj’s arrest. (Pl.’s 56.1 ¶¶ 23–60.) He was, in short, personally involved in
 9 the alleged use of excessive force. Ricks v. O’Hanlon, 2010 WL 245550, at *4 (S.D.N.Y. Jan
 10 19, 2010) (citing Williams v. Smith, 781 F.2d 319, 323–24 (2d Cir. 1986)).

11 III. Excessive Force and Qualified Immunity

12 Lieutenant Harrison argues that he is entitled to summary judgment on the
 13 excessive force claim because he is protected by qualified immunity. Qualified immunity shields
 14 government officials “from liability for civil damages insofar as their conduct does not violate
 15 clearly established statutory or constitutional rights of which a reasonable person would have
 16 known.” Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S.
 17 800, 818 (1982)). In deciding a government official’s qualified immunity claim on summary
 18 judgment, the court must consider (1) “whether the facts shown ‘make out a violation of a
 19 constitutional right’”; and (2) “whether the right at issue was clearly established at the time of
 20 defendant’s alleged misconduct.” Taravella v. Town of Wolcott, 599 F.3d 129 (2d Cir. 2010)
 21 (quoting Pearson, 555 U.S. 223 at 232).

22

23

1 a. Violation of a Constitutional Right

2 Lieutenant Harrison avers that Gjenashaj fails to establish a constitutional
 3 violation because his use of deadly force was reasonable. When a plaintiff claims “that law
 4 enforcement officials used excessive force in the course of making an arrest, . . . such claims are
 5 properly analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard.” Graham
 6 v. Connor, 490 U.S. 386, 388 (1989). Under this standard, granting summary judgment is
 7 appropriate only when “no reasonable factfinder could conclude that the officers’ conduct was
 8 objectively unreasonable.” Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 123 (2d Cir.
 9 2004). In particular, “an officer’s decision to use deadly force is objectively reasonable only if
 10 ‘the officer has probable cause to believe that the suspect poses a significant threat of death or
 11 serious injury to the officer or others.’” Cowan ex rel. Estate of Cooper v. Breen, 352 F.3d 756,
 12 762 (2d Cir. 2003) (citing O’Bert ex rel. Estate of O’Bert v. Vargo, 331 F.3d 29, 36 (2d Cir.
 13 2003)).

14 Here, “[t]he key determination of ‘reasonableness’ . . . depends on which version
 15 of events one credits.” Russo v. DiMilia, 894 F. Supp. 2d 391, 409 (S.D.N.Y. 2012). The
 16 parties dispute: (1) whether Gjenashaj pointed the gun at Lieutenant Harrison while she was
 17 inside the SUV; (2) whether Gjenashaj heard either officer yell “Gun!” or any other command;
 18 (3) whether Gjenashaj exited the vehicle with her hands up; (4) whether Gjenashaj was holding
 19 the gun when she exited the vehicle; and (5) whether Gjenashaj pointed the gun at the officers
 20 and assumed a two-handed shooting stance. (Pl.’s 56.1 ¶¶ 32, 34–42, 44, 47–49; Pl.’s Dep.,
 21 113:9–19, 118:22–119:21.)

22 Based on Gjenashaj’s testimony, she exited the car without the pistol and was shot
 23 by the officers while her hands were up signaling surrender. Thus, “if [Gjenashaj’s] version [of

1 events] is true . . . a reasonable jury could find that the use of deadly force was excessive.”
 2 Russo, 894 F. Supp 2d at 410. Under these facts, a jury could find that Lieutenant Harrison did
 3 not have probable cause to believe that Gjenashaj “pose[d] a significant threat of death or serious
 4 injury to the officer or others.” See Cowan, 352 F.3d at 762. Indeed, the Second Circuit has
 5 consistently held that summary judgment is inappropriate if “it is clear that determination of [a
 6 constitutional violation] ‘turns on which of two conflicting stories best captures what happened
 7 on the street.’” Cowan, 352 F.3d at 763 (quoting Saucier v. Katz, 533 U.S. 194, 216 (2001));
 8 see, e.g., Thomas v. Roach, 165 F.3d 137, 144 (2d Cir. 1999) (“Because the district court could
 9 not determine whether the officers reasonably believed that their force was not excessive when
 10 several material facts were still in dispute, summary judgment on the basis of qualified immunity
 11 was precluded.”); Hemphill v. Schott, 141 F.3d 412, 416–18 (2d Cir. 1998) (holding that the
 12 district court erred by entering summary judgment on qualified immunity when there were
 13 disputes remaining about “material factual issues”). Accordingly, the genuine disputes of
 14 material facts present here preclude summary judgment on this issue.

15 b. Clearly Established Right at Issue

16 Even assuming there was a violation of a constitutional right, summary judgment
 17 is still inappropriate. Lieutenant Harrison argues that because his conduct did not violate a
 18 clearly established constitutional right, he is entitled to summary judgment based on qualified
 19 immunity. “The doctrine of qualified immunity protects government officials from liability for
 20 civil damages insofar as their conduct does not violate clearly established statutory or
 21 constitutional rights of which a reasonable person would have known.” Pearson, 555 U.S. at 231
 22 (quotation marks omitted). “A clearly established right is one that is ‘sufficiently clear that every
 23 reasonable official would have understood that what he is doing violates that right.’” Mullenix

1 v. Luna, 577 U.S. 7, 11 (2015) (per curiam) (quoting Reichle v. Howards, 566 U.S. 658, 664
 2 (2012)).

3 As previously discussed, there are genuine issues of material fact regarding the
 4 reasonableness of Lieutenant Harrison’s conduct. Because these “disputes overlap both the
 5 excessive force and qualified immunity issues, summary judgment must be denied.” Cowan, 352
 6 F.3d at 764 (denying summary judgment on a qualified immunity claim after determining in the
 7 excessive force analysis that there were genuine issues of material fact regarding the
 8 reasonableness of the officers’ conduct); see also Bennett v. Falcone, 2009 WL 816830, at *6
 9 (S.D.N.Y. Mar. 25, 2009) (“For the same reasons Plaintiff’s excessive force claim survives
 10 summary judgment, the Court holds Defendants’ qualified immunity claim insufficient.”).

11 IV. Supervisory Liability

12 Gjenashaj claims that Lieutenant Harrison has supervisory liability because he
 13 was the “highest ranking officer” on the scene. (Mem. of Law in Opp’n to Def.’s Mot. for
 14 Summ. J., ECF No. 97 (“Pl.’s Mem.”), at 14.) Specifically, Gjenashaj avers that Harrison should
 15 have required Officer Maratea to wear a body-worn camera; did not follow proper NYPD
 16 procedures for dealing with emotionally disturbed individuals; and failed to follow a series of
 17 NYPD guidelines.¹ (Pl.’s Mem., at 14.)

18 But § 1983 “does not provide a remedy for violations of best police practices.”
 19 Bah v. City of New York, 2017 WL 435823, at *6 (S.D.N.Y. Jan. 31, 2017). Indeed, “[a]
 20 violation of the Patrol Guide or departmental policy does not, in and of itself, amount to the

¹ “In addition, Lieutenant Harrison failed to notify the Precinct Commander, failed to establish a proper command structure at the scene, failed to require the deployment of protective shields and failed to even attempt to use non-lethal devices to ensure the safety of all those present as required by the guidelines. Supervisors also failed to request assistance from a medical expert and to seek assistance from the subject’s family or friends as further required by the guidelines.” (Pl.’s Mem., at 14.)

1 violation of a right protected by the Constitution or federal law.” Bah, 2017 WL 435823, at *6
2 (citing United States v. Wilson, 699 F.3d 235, 243 (2d Cir. 2012)). Gjenashaj’s claims amount
3 to nothing more than—perhaps valid—grievances that the officers should have abided by proper
4 NYPD procedures. Moreover, to the extent that she claims the officers should have used
5 protective shields or non-lethal force, this is encompassed in her excessive force claim.
6 Therefore, the supervisory liability claim is dismissed. See, e.g., Lopez v. City of New York,
7 186 F. Supp. 3d 304, 313 n.7 (S.D.N.Y. 2016) (“Section 1983 is not a remedy for violations of
8 the NYPD Patrol Guide.”); see also Rizk v. City of New York, 462 F. Supp. 3d 203, 220
9 (E.D.N.Y. 2020) (“[A]n act or omission that violates police policy but does not also violate
10 constitutional rights is not actionable under § 1983.”).

11 CONCLUSION

12 For the foregoing reasons, Defendant’s motion for summary judgment is granted
13 in part and denied in part. Specifically, Defendant Lieutenant Harrison’s motion for summary
14 judgment on the excessive force claim is denied. His motion for summary judgment on the
15 supervisory liability claim is granted. The Clerk of Court is directed to terminate the motion
16 pending at ECF No. 93.

17 Dated: December 14, 2020
18 New York, New York

SO ORDERED:


WILLIAM H. PAULEY III
U.S.D.J.